

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue date: 30Jan2002

.....
In the Matter of:

SAMUEL W. TAYLOR,
Claimant,

v.

EASTERN ASSOCIATED COAL
CORPORATION,
Employer,

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-In-Interest
.....

Case No: 1999-BLA-880

Joseph E. Wolfe
For the Claimant

Paul E. Frampton, Esquire
For the Employer

Before: EDWARD TERHUNE MILLER
Administrative Law Judge

DECISION AND ORDER -- REJECTION OF CLAIM

Statement of the Case

This proceeding involves a claim for benefits under the Black Lung Benefits Act as amended, 30 U.S.C. §901 *et seq.* (the Act), and the regulations promulgated thereunder.¹ Since Claimant filed this application for benefits after March 31, 1980, Part 718 applies. This claim is governed by the law of the Fourth Circuit of the United States since Claimant was last employed in the coal industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

¹ All applicable regulations which are cited in this Decision and Order are included in Title 20, Code of Federal Regulations, and are cited by part or section only. The Director's exhibits are denoted "D-"; Claimant's exhibits, "C-"; Employer's exhibits, "E-"; and citations to the transcript of the hearing, "Tr."

Claimant, Samuel W. Taylor, filed his first claim for benefits under the Act on February 3, 1986 (D-28-1). The claim was denied by the Department of Labor on April 10 of that year (D-28-17). A second claim was filed on December 15, 1989, and was denied on May 24, 1990 for failure to establish that the Claimant was totally disabled by pneumoconiosis and that a material change in conditions had occurred since his previous claim was denied (D-29-1, -23). The Claimant filed a third claim for benefits on July 12, 1991 (D-30-1). That claim was also denied, on December 17, 1991, for failure to establish either total disability due to pneumoconiosis or a material change in conditions since the denial of his previous claim (D-30-22). A fourth claim was filed on March 25, 1993 (D-31-1). That claim was adjudicated before Administrative Law Judge Christine M. Moore, who denied the claim on November 2, 1994 (D-39-65). Again, Claimant failed to establish total disability due to pneumoconiosis or a material change in conditions since the denial of his previous claim. Claimant appealed Judge Moore's decision to the Benefits Review Board, which affirmed Judge Moore's denial of the claim on September 28, 1995 (D-39-75). Slightly over one year later, Claimant filed a fifth claim for benefits on October 28, 1996 (D-40-1). The Department of Labor denied that claim on January 23, 1997 because the evidence did not show that the Claimant was total disabled by pneumoconiosis (D-40-24).

Claimant filed this, the sixth claim, on September 16, 1998 (D-1). On December 8, 1998, the Department of Labor issued an initial finding of entitlement, and on March 17, 1999, the District Director affirmed that finding (D-21, 25). The Employer, Eastern Associated Coal Corporation, requested a formal hearing on March 25, 1999 (D-26). The claim was forwarded to the Office of Administrative Law Judges and a hearing was held before this tribunal on March 9, 2000 in Abingdon, Virginia.

ISSUES²

1. Whether, under §725.309, Claimant has shown a material change in conditions since the previous denial of benefits on January 23, 1997, by establishing that he is totally disabled by a respiratory or pulmonary impairment.
2. If so, whether Claimant has established the remaining element of entitlement to benefits under Part 718, namely, that if he is totally disabled, that total disability is due to pneumoconiosis.

FINDINGS OF FACT AND CONCLUSION OF LAW

² Although Employer contested all applicable issues in this claim, and stipulated to timeliness, the Claimant's identity as a miner, Claimant's length of and post 1969 employment, and dependency at the hearing, this tribunal limits consideration to those issues which are in substantial dispute and those which were argued by Employer in Employer's Closing Argument.

Background and Usual Coal Mine Employment

The Claimant, Samuel W. Taylor, was born October 28, 1932 and completed four years of formal education. (D-1). He married Betty Kilby on August 29, 1953, and the couple was still married when this claim was filed in 1998. The Claimant began working in the coal mines when he was seventeen years old (Tr. 13). Claimant alleged thirty-four years of coal mine employment, and the Employer stipulated to, and the record supports a finding of, thirty-six years of coal mine employment (D-41; Tr. 10). Claimant worked for the Employer, Eastern Associated Coal Corporation, from October 14, 1965 through January 29, 1986 (D-4, 18). The Employer is the properly designated responsible operator in this claim. Although the Claimant's last coal mine employment of more than one year was with Benafuels, Inc., Benafuels Inc. filed for Chapter 11 bankruptcy in 1989, and since the Claimant worked for Benafuels Inc. after its last insurance coverage, the company was considered uninsured (D-6,18). *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. Sept 7, 2000).

The main issue in this case is whether the Claimant is totally disabled under §718.204. To establish total disability, the Claimant must prove that he is unable to engage in either his usual coal mine work or comparable and gainful work as defined in §718.204. In assessing total disability under §718.204(b)(2)(iv), the administrative law judge, as the fact-finder, is required to compare the exertional requirements of the claimant's usual coal mine employment with a physician's assessment of the claimant's respiratory impairment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) (A finding of total disability may be made by a physician who compares the exertional requirements of the miner's usual coal mine employment against his physical limitations). A miner's "usual coal mine employment" is not necessarily the most arduous work he had ever performed, but, rather, it is work that he performed regularly and over a substantial period of time. §718.204(b)(1); §30 U.S.C. §902(f)(1)(A) and (B). Further, it cannot be "favored" work; that is, work designed to accommodate an already debilitated miner. §30 U.S.C. §902(f)(1)(B)(ii); §718.204(e)(3) and (4); *see Bowling v. Director, OWCP*, 920 F.2d 342, 344 (6th Cir. 1990). The Claimant's usual coal mine employment is not clearly described by the record. Since the filing of his original claim in 1986, Claimant not only continued to work in the coal mining industry, but his description of his "last" coal mine employment, which is widely accepted as a miner's usual coal mine employment if such employment lasted at least one year in duration, has changed enough such that this tribunal does not find his testimony credible in this regard. Accordingly, this tribunal must make a finding regarding what constitutes the Claimant's usual coal mine employment for purposes of adjudicating this claim.

This tribunal finds that the Claimant's earliest accounts of his last coal mine employment, as reported in his various CM-911a forms, provide the most reliable and accurate identification of his usual coal mine employment. Accordingly, this tribunal finds that the Claimant's last and usual coal mine employment was as a tippie operator for Benafuels, Inc. The evidentiary record indicates that the Claimant worked at Benafuels regularly, working eight hour shifts, for over a year and a half, a substantial period of time (D-2, Tr. 27). There is no evidence that the Claimant's work as a tippie operator was favored work, as the record indicates that he left his

former position as a car dumper with Genoa Coal Company when the mine switched owners. Moreover, the Claimant's various descriptions of his work as either a tippie operator or a coal dumper did not differ qualitatively. The record establishes that the Claimant's usual work required him to turn and upright coal cars, dumping the cars' contents into a bin, all of which was done manually by pushing a button. If the car did not properly empty its contents or there was some other "hang up," as described the Claimant, he was required to engage in physical labor, usually shoveling or breaking up coal or rock, cleaning, and transporting supplies. These "hang ups" were described as occurring perhaps twice per day (Tr. 33). Accordingly, the Claimant's usual coal mine employment as a tippie operator required variable exertion with significant intermittent moderate to heavy activity.

Medical Evidence Developed Subsequent to the Closing
of the Record on Which the Prior Denial was Based³

X-rays⁴

| Exhibit No. | X-ray Date | Reading Date | Physician/Qualifications | Diagnosis |
|--------------------|-------------------|---------------------|---------------------------------|--------------------------------------|
| E-2 | 3/26/84 | 9/16/99 | Gayler B/R | -/- |
| E-2 | 3/26/84 | 9/16/99 | Scott B/R | -/-; pi |
| E-2 | 3/26/84 | 9/17/99 | Wheeler B/R | -/-; pi, tb |
| E-2 | 1/25/90 | 9/17/99 | Wheeler B/R | -/-; tb |
| E-2 | 1/25/90 | 9/16/99 | Scott B/R | -/-; tb, od-fibrosis |
| E-2 | 1/25/90 | 9/16/99 | Gayler B/R | -/- |
| E-2 | 8/30/90 | 9/17/99 | Wheeler B/R | underexposure; -/-; tb |
| E-2 | 8/30/90 | 9/16/99 | Scott B/R | underexposure; -/-; tb, od |
| E-2 | 8/30/90 | 9/16/99 | Gayler B/R | -/- |
| E-2 | 11/7/91 | 9/17/99 | Wheeler B/R | -/-; tb |
| E-2 | 11/7/91 | 9/16/99 | Scott B/R | -/-; tb, od |
| E-2 | 11/7/91 | 9/16/99 | Gayler B/R | -/- |
| E-2 | 1/2/92 | 9/17/99 | Wheeler B/R | underexposure; -/-; tb, od |
| E-2 | 1/2/92 | 9/16/99 | Scott B/R | -/-; tb, od- fibrosis |
| E-2 | 1/2/92 | 9/16/99 | Gayler B/R | -/- |
| E-2 | 8/4/92 | 9/17/99 | Wheeler B/R | underexposure; -/-; tb, od- fibrosis |
| E-2 | 8/4/92 | 9/16/99 | Scott B/R | underexposure; -/-; tb |

³ The Department of Labor's January 23, 1997 denial of the Claimant's fourth subsequent claim constitutes the previous denial for the purposes of this proceeding, as neither party appealed that denial and it became final (D-40-24).

⁴ The following abbreviations are used in describing the qualifications of the physicians: B-reader, "B"; Board-certified radiologist, "R". This tribunal takes judicial notice that Dr. Deponte was listed as B-reader on the List of NIOSH Approved Readers. See *Maddaleni v. Pittsburgh & Midway Coal Mining Co.*, 14 B.L.R. 1-135 (1990). An interpretation indicating "-/-" is used by this tribunal to signify that the x-ray was not classified as positive for pneumoconiosis in accordance with the requirements of §718.102 of the pre-amended regulations.

| Exhibit No. | X-ray Date | Reading Date | Physician/Qualifications | Diagnosis |
|--------------------|-------------------|---------------------|---------------------------------|---|
| E-2 | 8/4/92 | 9/16/99 | Gayler B/R | light; -/- |
| E-2 | 8/25/92 | 9/17/99 | Wheeler B/R | -/-; pi, tb |
| E-2 | 8/25/92 | 9/16/99 | Scott B/R | -/-; tb |
| E-2 | 8/25/92 | 9/16/99 | Gayler B/R | -/- |
| E-2 | 11/17/93 | 9/17/99 | Wheeler B/R | underexposure; -/-; pi, tb, od |
| E-2 | 11/17/93 | 9/16/99 | Scott B/R | underexposure; -/-; tb, od few nodules |
| E-2 | 11/17/93 | 9/16/99 | Gayler B/R | light; -/- |
| E-3 | 10/15/96 | 9/15/99 | Wheeler B/R | moderate underexposure; 0/1, q/q; tb, od |
| D-15 | 11/16/98 | 11/16/98 | Forehand B | 1/1, q/t; sternal wires; coronary artery markers |
| D-16 | 11/16/98 | 12/3/98 | Gaziano B | 2/2, r/q |
| E-3 | 11/16/98 | 9/15/99 | Wheeler B/R | light; 0/1, q/q; tb, od |
| E-3 | 11/16/98 | 9/14/99 | Scott B/R | light; 0/1, r/q; od |
| E-1 | 1/27/99 | 3/8/99 | Zaldivar B | 1/1, q/r |
| E-5 | 1/27/99 | 9/23/99 | Wheeler B/R | underexposure; -/-; tb, od |
| E-5 | 1/27/99 | 9/23/99 | Scott B/R | underexposure; -/-; od |
| E-5 | 1/27/99 | 9/23/99 | Gayler B/R | light; -/- |
| C-1 | 10/9/99 | 10/26/99 | Deponte R/B | 1/0, s/t |
| E-7 | 12/3/99 | 2/2/00 | Wheeler B/R | -/-; od |
| E-7 | 12/3/99 | 2/3/00 | Gayler B/R | light; -/-; tb |
| E-7 | 12/3/99 | 2/3/00 | Scott B/R | -/-; tb |
| C-3 | 1/18/00 | 1/18/00 | Robinette B | 2/1; q/t; coalescence; emphysema |
| C-3 | 1/18/00 | 1/18/00 | Mullens R | -/-; Nodular interstitial lung disease consistent with silicosis/CWP; previous CABG |

CT Scans

| Exhibit No. | CT Scan Date | Reading Date | Physician/Qualifications | Diagnosis |
|--------------------|---------------------|---------------------|---------------------------------|---|
| E-5 | 12/6/96 | 9/23/99 | Wheeler B/R | Small nodules in both posterior pleura and right lateral pleura with probable subtle interstitial infiltrate or fibrosis in portions of both upper lobes. |
| E-5 | 12/6/96 | 9/23/99 | Scott B/R | 1 cm subpleural density posterior LUL with adjacent thickened pleura, probably due to healed inflammatory disease; few sub-centimeter peripheral nodules mid lung bilaterally and left lower lung, probably granulomata, cannot exclude metastases. |

Pulmonary Function Studies^{5, 6}

| Exh. No. | Date Of Test | Age/ Height | Valid | FEV1 | MVV | FVC | Ratio | Qualify |
|-----------------|---------------------|--------------------|--------------|--------------|------------|--------------|--------------|----------------|
| D-11 | 11/16/98 | 66/66" | Yes | 2.23 | 79 | 2.84 | | No |
| E-1 | 1/27/99 | 66/66" | Yes | 2.25 | 89 | 2.96 | 76 | No |
| E-8 | 12/3/99 | 67/68" | Yes | 2.22 2.41 | 70 80 | 3.02 3.11 | 73 77 | No |
| C-5 | 1/18/00 | 67/65" | Yes | 2.05 2.28 | | 2.67 2.96 | 77 77 | No No |

⁵ Second set of entries, if any, on the same test relates to results after administration of bronchodilators.

⁶ Because different heights have been recorded for Claimant, this tribunal must resolve the height discrepancy. *Protoppas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). This tribunal averaged the recorded heights, disregarding the December 3, 1999 measurement as an outlier, and determined that Claimant is 65.7 inches tall.

Arterial Blood Gas Studies^{7, 8, 9}

| Exhibit No. | Test Date | PCO2 | PO2 | Qualify |
|--------------------|------------------|-------------|------------|----------------|
| D-13 | 11/16/98 | 35 | 64 | Yes |
| | | 30 | 98 | No |
| E-1 | 1/27/99 | 42 | 83 | No |
| | | 32 | 101 | No |
| C-4 | 1/18/00 | 36.2 | 74 | No |

Medical Reports and Opinions

Dr. J. Randolph Forehand, who is board-certified in pediatrics and allergy and immunology, examined the Claimant on November 16, 1998. (D-11, 12, 13, 15). Dr. Forehand recorded an employment history of forty years of coal mine employment, working lastly as a tippie operator, with thirty of those years completed underground, a family history, and a medical history. Dr. Forehand recorded a smoking history of one pack of cigarettes every three days since 1978. He noted that the Claimant was still smoking at the time of the examination. The examination included an x-ray, pulmonary function testing, an arterial blood gas study, and an EKG. Dr. Forehand diagnosed Claimant with coal workers' pneumoconiosis based on Claimant's history and chest x-ray. He also diagnosed coronary artery disease based on history, EKG and physical examination. He attributed Claimant's coal workers' pneumoconiosis to his coal dust exposure and his coronary artery disease to atherosclerosis. Dr. Forehand concluded that no significant respiratory impairment existed, noting that the Claimant's resting hypoxemia was due to nonpulmonary factors. He noted that the exercise arterial blood gas was normal and that the Claimant had a mildly obstructive ventilatory pattern with some restriction. Dr. Forehand concluded that the Claimant's cardiac status may prevent him from returning to his last coal mining job. He also concluded that, "atherosclerotic cardiovascular disease is the sole factor which might prevent claimant from working."

Dr. Joseph J. Renn, who is board-certified in internal medicine and the subspecialty of pulmonary diseases, provided a consultative medical report dated October 1, 1999. (E-4). Dr. Renn reviewed specified medical records and reports set out in the first page of his report. Dr. Renn summarized cardiopulmonary, occupational, tobacco, past medical and family histories. Dr. Renn concluded that the Claimant had simple coal workers' pneumoconiosis, arteriosclerotic coronary vascular disease, angina pectoris, systemic hypertension, chronic bronchitis without obstruction and adult onset diabetes. He found no ventilatory impairment. Dr. Renn concluded that when considering the Claimant's respiratory system alone, the Claimant was "not totally and permanently impaired to the extent that he would be unable to perform either his last known coal mining job or his next to last

⁷ Second set of entries, if any, on the same test relates to results after administration of exercise.

⁸ Dr. Gaziano, who is board-certified in internal and critical care medicine and the subspecialty of pulmonary diseases, found the study performed on November 16, 1998 technically acceptable. (D-14).

⁹ Exercise study of January 27, 1999 was terminated due to chest pain unrelated to any pulmonary condition (E-1).

known coal mining job or any similar work effort.” He concluded that the Claimant’s simple coal workers’ pneumoconiosis resulted from his occupational exposure, but that his arteriosclerotic coronary vascular disease, systemic hypertension, chronic bronchitis, and diabetes were neither caused, nor contributed to, by his occupational exposure to coal mine dust. Dr. Renn ended his report by stating that the Claimant’s chronic bronchitis resulted from his years of tobacco smoking.

Dr. Renn was deposed on February 24, 2000. (E-10). Dr. Renn reiterated his findings that the Claimant’s respiratory system functions normally (E-10 at 7-8). However, Dr. Renn explained that he based a diagnosis of chronic bronchitis on the Claimant’s reported history of having coughed for at least three days a week for at least three months of the year, and not on clinical data (E-10 at 21-22). Dr. Renn explained that chronic bronchitis can only be diagnosed in terms of objective medical tests when there is a pathology specimen available (E-10 at 21). Dr. Renn testified regarding his experience and training, reiterated his previous findings and conclusions, and explained how he and other physicians were able to reach such conclusions. Dr. Renn concluded the deposition by repeating that from a respiratory and pulmonary standpoint the Claimant is neither impaired or disabled. As a whole man, Dr. Renn did find the Claimant to be impaired and/or disabled by his severe arteriosclerotic coronary vascular disease and that his coal mine employment did not contribute in any way to this impairment (E-10 at 57).

Dr. Gregory J. Fino, who is board-certified in internal medicine and the subspecialty of pulmonary diseases, prepared a consultative report, dated October 4, 1999, based on review of specified medical records and reports dating back to 1973. (E-6). Dr. Fino summarized the entirety of the data he received. Dr. Fino found that, while simple pneumoconiosis was present radiographically, the clinical data was inconsistent with a diagnosis of coal workers’ pneumoconiosis because the Claimant’s spirometric evaluations were normal, his normal MVV meant that there was no ventilatory impairment due to any obstructive or restrictive ventilatory defect, his diffusing capacity values were normal--ruling out the presence of pulmonary fibrosis, his lung volumes were normal, and the Claimant did not demonstrate any impairment in oxygen transfer. From a functional standpoint, Dr. Fino determined that the Claimant’s pulmonary system was normal and that he retained the physiologic capacity from a respiratory standpoint to perform all of the requirements of his last job, assuming his last job required sustained heavy labor. Dr. Fino concluded that the Claimant was neither partially or totally disabled from returning to his last mining job or a job requiring similar effort.

Dr. Fino was deposed on February 24, 2000. (E-11). Dr. Fino explained his protocol for providing consultation in pulmonary diseases (E-11 at 5-6). Dr. Fino explained the use of pulmonary function testing to diagnose restrictive diseases and reviewed the Claimant’s pulmonary function testing performed by Dr. Robinette (E-11 at 7-11). He reviewed the arterial blood gas studies performed by Dr. Forehand in November 1998 and agreed with Dr. Forehand’s findings that the Claimant’s resting hypoxia was due to non-pulmonary factors (E-11 at 11-12). Dr. Fino reiterated his overall assessment of the Claimant’s condition, noting that there has been no significant change in the Claimant’s condition from the 1993-1994 period to the present (E-11 at 12-15). Dr. Fino testified as to his present and past licensure to practice medicine (E-11 at 15-21). Dr. Fino explained his understanding of the Claimant’s work history and the associated exertional requirements, which

corroborated the work history reported by the Claimant and recorded by other physicians of record (E-11 at 23-25). Dr. Fino agreed that pneumoconiosis due to coal mine dust inhalation may be progressive (E-11 at 27).

Dr. George L. Zaldivar, who is board-certified in internal and critical care medicine and in the subspecialty of pulmonary diseases, examined the Claimant on January 27, 1999 and reviewed specified medical records dating back to 1986 in preparation for his report dated March 10, 1999. (E-1). Dr. Zaldivar recorded a forty-year work history, lastly as a dumper for twelve years, a medical history significant for diabetes, a family, and a personal history. Dr. Zaldivar noted that the Claimant is a current smoker, noting that he smoked one pack of cigarettes per week. The examination included an x-ray, pulmonary function testing, an arterial blood gas study, and an EKG. Dr. Zaldivar found normal lung volumes, mild reduction of forced vital capacity, high carboxyhemoglobin of a current smoker, limited ability to exercise due to chest pain of cardiac origin without any pulmonary limitation to exercise, and radiographic evidence of simple pneumoconiosis. Dr. Zaldivar concluded that the Claimant had radiographic evidence of simple pneumoconiosis with no pulmonary impairment. He concluded that the Claimant had a mild asthmatic condition unrelated to his occupation. Dr. Zaldivar found no pulmonary limitation to exercise or work, and concluded that from the pulmonary standpoint, the Claimant was capable of performing not only his usual coal mining work, but work requiring similar exertion, and even arduous manual labor. Dr. Zaldivar found that the Claimant had significant coronary artery disease which is responsible for his chest pains, and is due to coronary atherosclerosis unrelated to his former occupation.

Dr. Zaldivar was deposed on February 22, 2000. (E-9). He testified that since his first examination of the Claimant in 1993, the Claimant's condition had remained exactly the same, neither worsening or improving (E-9 at 25). Dr. Zaldivar reiterated that the Claimant's lungs were capable of performing any kind of arduous manual labor, explaining that whether or not the Claimant's cardiovascular and musculoskeletal system could handle such work at his age is a different story (E-9 at 33). He noted that it was the Claimant's heart disease which currently prevented him from engaging in heavy labor (E-9 at 34). Dr. Zaldivar testified regarding his credentials, the use of pulmonary function studies in general, and his findings and conclusions for this case.

Dr. Emory Robinette, who is board-certified in internal medicine and the subspecialty of pulmonary diseases, examined the Claimant on January 18, 2000. (C-2, 3, 4, 5, 6). Dr. Robinette recorded an employment history of forty years of coal mine employment, working lastly as a coal dumper in the cleaning and processing plant, with thirty of those years completed underground, a family history, and a medical history. Dr. Robinette noted that the Claimant's medical history was complicated by underlying diabetes and hypertensive cardiovascular disease. Dr. Robinette recorded that the Claimant stopped smoking four years prior to the examination and that prior to that time, he smoked one pack of cigarettes every three to four days from the time he was forty-eight. Claimant had also reported that he currently chewed tobacco and has done so in the past. The examination included an x-ray, pulmonary function testing, an arterial blood gas study, and an EKG. Dr. Robinette concluded that the Claimant had coal workers' pneumoconiosis with evidence of axillary coalescence and emphysematous change based on x-ray interpretation, probable mild restrictive lung disease

without response to bronchodilator therapy, ASCVD status post coronary bypass surgery, non-insulin dependent diabetes mellitus, hypertensive cardiovascular disease, and normal arterial blood gas studies. Dr. Robinette did not opine as to whether the Claimant was totally disabled.

Subsequent Claim

Since the instant claim was filed more than one year after the denial of Claimant's previous claim, it is considered a duplicate or subsequent claim under the Act. §725.309. A subsequent claim is to be denied on the same grounds as the previous denial unless the claimant demonstrates that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final. §725.309(d). Under applicable case law, this standard is referred to as a "material change in conditions." See *Lisa Lee Mines v. Director, OWCP (Rutter)*, 86 F.3d 1358, 20 B.L.R. 2-227 (4th Cir. 1996)(*en banc*). To prove a material change in conditions, a claimant must prove, under all the favorable and unfavorable medical evidence of his condition after the previous denial, at least one of the elements previously adjudicated against him. *Id.* In the instant claim, the previous denial was based on the finding that Claimant did not establish that he was totally disabled by pneumoconiosis (D-40-24). Therefore, in order to establish a material change in conditions, Claimant must establish, by virtue of the evidence relating to his medical condition after the previous denial, that he is totally disabled, and if so, that his total disability is due to pneumoconiosis.

Total Disability

To establish total disability, Claimant must prove that he is unable to engage in either his usual coal mine work or comparable and gainful work as defined in §718.204. Section 718.204(b)(2) provides the criteria for determining whether a miner is totally disabled. These criteria are: (1) pulmonary function tests qualifying under applicable regulatory standards; (2) arterial blood gas studies qualifying under applicable regulatory standards; (3) proof of pneumoconiosis and cor pulmonale with right sided congestive heart failure; or (4) proof of a disabling respiratory or pulmonary condition on the basis of the reasoned medical opinions of a physician relying upon medically acceptable clinical and laboratory diagnostic techniques. If there is contrary evidence in the record, all the evidence must be weighed in determining whether there is proof by a preponderance of the evidence that the miner is totally disabled by pneumoconiosis. *Shedlock v. Bethlahem Mines. Corp.*, 9 B.L.R. 1-95 (1986).

None of the four pulmonary function studies conducted since the previous denial of this claim yielded qualifying results, and, accordingly, disability is not established under §718.204(b)(2)(i). Of three arterial blood gas studies conducted since the previous denial of this claim, only one resting study produced qualifying results, the November 16, 1998 study of Dr. Forehand (D-13). However, the exercise study performed on that same date did not produce qualifying values (D-13). Additionally, Dr. Forehand opined that the Claimant's resting hypoxemia was due to non-pulmonary factors and noted that the Claimant's exercise arterial blood gas study was normal (D-12). Dr. Renn, who reviewed all three arterial blood gas studies, stated that both the resting and exercise studies all

produced normal values for the Claimant's age (E-10 at 20). He further corroborated Dr. Forehand's opinion, stating that the exercise arterial blood gas study negated the qualifying resting study (E-10 at 35). Dr. Fino reviewed Dr. Forehand's arterial blood gas study in addition to the other studies of record. Dr. Fino explained that, although the November 16, 1998 study showed resting hypoxia, all the other resting arterial blood gases drawn before and after that were normal with exercise (E-11 at 13). He noted that on seven different occasions, the Claimant's PO₂ had gone up with exercise, indicating that he had no impairment in oxygen transfer and that the Claimant's lungs could move enough oxygen into his blood stream to sustain heavy labor (E-11 at 13). Accordingly, the Claimant's single qualifying resting arterial blood gas is outweighed by the exercise study performed soon thereafter and the other studies of record, and was found inconsistent with abnormal lung function by three reviewing physicians. Therefore, the preponderance of the arterial blood gas study evidence does not establish total disability under §718.204(b)(2)(ii). Since the medical evidence does not indicate that Claimant suffered from cor pulmonale with right-sided congestive heart failure, Claimant has failed to establish total disability under §718.204(b)(2)(iii).

None of the physicians in this case opined that the Claimant was totally disabled by a respiratory or pulmonary condition. All five physicians who provided opinions understood that the Claimant's last coal mine employment required at least moderate exertion with periods of heavy physical activity. However, none opined that from a respiratory or pulmonary standpoint, the Claimant would be unable to return to his former coal mine employment, and some opined that he would be able to perform more arduous work. Dr. Forehand concluded that the Claimant did not have a significant respiratory impairment (D-12). However, he opined that the Claimant's cardiac status might prevent the Claimant from returning to his last coal mining job.¹⁰ (D-12). After finding that the Claimant had no ventilatory impairment, Dr. Renn concluded that when considering the Claimant's respiratory system alone, the Claimant was "not totally and permanently impaired to the extent that he would be unable to perform either his last known coal mining job or his next to last known coal mining job or any similar work effort." (E-4). In a detailed analysis, Dr. Fino ruled out the existence of any respiratory impairment and concluded that from a functional standpoint, the Claimant's pulmonary system was normal and that he retained the physiologic capacity from a respiratory standpoint to perform all of the requirements of his last job, assuming his last job required sustained heavy labor (E-6). Dr. Zaldivar, who provided the most detailed account of the Claimant's former coal mine employment, found no pulmonary impairment, and concluded that, from a pulmonary standpoint, the Claimant was capable of performing not only his usual coal mining work, but work requiring similar

¹⁰ Dr. Forehand examined the Claimant on August 6, 1993 and found him totally disabled and unable to return to his last coal mining job based on the Claimant's history and exercise performance, "dyspnea and chest pain at low work load." (D-31-11). Dr. Forehand attributed the Claimant's disabling impairment to his coronary artery disease, which caused chest discomfort and lack of stamina during work, and his coal workers' pneumoconiosis, which caused labored respiration during mild exercise and possible interference with gas exchange. At the time, the Claimant's arterial blood gas and pulmonary function studies yielded normal and non-qualifying results. Dr. Forehand's 1993 opinion is not well-reasoned because it is inconsistent with the objective medical data and relies heavily on the Claimant's history and behavior during one exercise test. Dr. Forehand's more recent opinion from 1998 provides a more thorough analysis of the Claimant's condition and is based on the objective evidence of record. Accordingly, Dr. Forehand's most recent opinion regarding the Claimant's respiratory and pulmonary condition is deemed to supersede his previous opinion in this case.

exertion, and even arduous manual labor (E-1). Like Dr. Forehand, Dr. Zaldivar noted that it was the Claimant's heart disease, unrelated to his former coal mining employment, which prevented him from engaging in heavy labor (E-9 at 33). Dr. Robinette did not opine as to whether the Claimant was totally disabled (C-2, 3, 4, 5, 6). Therefore, because none of the physicians who provided reasoned medical opinions opined that the Claimant was totally disabled by a pulmonary or respiratory impairment, the Claimant has not established that he is totally disabled under §718.204(b)(2)(iv). Accordingly, based on review of the evidence under §718.204(b)(2) this tribunal finds that Claimant has failed to establish that he is totally disabled by a respiratory or pulmonary impairment, and, therefore, has failed to establish a material change of conditions in regard to this element of entitlement.

Total Disability Due to Pneumoconiosis

To establish entitlement, a claimant must prove by a preponderance of the evidence that he is totally disabled due to pneumoconiosis. A miner is considered totally disabled due to pneumoconiosis if pneumoconiosis is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. §718.204(c)(1). Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it has a material adverse effect on the miner's respiratory or pulmonary condition, or it materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. *Id.* In this case, the preponderance of the evidence did not establish that the Claimant is totally disabled. Therefore, the issue of whether the Claimant is totally disabled due to pneumoconiosis is moot.

Attorney's Fee

The award of an attorney's fee under the Act will be approved only in cases in which the claimant is found to be entitled to benefits. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for services of an attorney rendered to the Claimant in pursuit of this claim.

-13-
ORDER

The claim of Samuel W. Taylor for benefits under the Act is hereby denied.

A

EDWARD TERHUNE MILLER
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. §725.481, any interested party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision and Order by filing a notice of appeal with the **Benefits Review Board, P.O. Box 37601, Washington, D.C. 20013-7601**. A copy of the notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor, Room N-2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.